

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA T. LEWIS,

Plaintiff-Appellant,

v

THE THYSSEN GROUP, d/b/a THYSSEN
INCORPORATED, THYSSEN AG, THYSSEN
STEEL GROUP, INC., N.A., TSG TRADING
GROUPS, THYSSEN STEEL GROUP, THYSSEN
N.A., THYSSEN PLASTICS, TSGD THE
DETROIT GROUP, THYSSEN STEEL DETROIT,
KENNETH J. GRAHAM, NICK TOLERICO,
DONALD GRAHAM, WILLIAM BORLAND,
a/k/a BILL BORLAND, and JOHANN
FINKELMEIR,

Defendants-Appellees.

UNPUBLISHED
September 15, 2000

No. 212565
Wayne Circuit Court
LC No. 97-702549-CZ

Before: Hoekstra, P.J., and Gribbs and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiff's employment discrimination complaint. We affirm.

We review a trial court's ruling on a motion for summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Summary disposition is

appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Maiden, supra* at 120; *Smith, supra*.

A prima facie case of discrimination can be established by proof of intentional discrimination or disparate treatment. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994). To prove a direct evidence claim of intentional discrimination, the plaintiff “must show that she was a member of a protected class, that she was discharged or otherwise discriminated against with respect to employment, that the defendant was predisposed to discriminate against persons in the class, and that the defendant acted upon that disposition when the employment decision was made.” *Id.*

In support of her claim, plaintiff relied on incidents involving, or conduct by, Kenneth Graham, Bill Borland, and Johann Finkelmeir. However, she made no showing that these defendants’ statements or conduct were motivated by racial animus. In addition, there was no evidence that any of these defendants were involved in the decision to terminate her employment, so their conduct is not evidence of discrimination by the employer. *Wells v New Cherokee Corp*, 58 F3d 233, 238 (CA 6, 1995); *Wilson v Stroh Companies, Inc*, 952 F2d 942, 945-946 (CA 6, 1992); *McDonald v Union Camp Corp*, 898 F2d 1155, 1161 (CA 6, 1990).

Plaintiff’s claim against Donald Graham is based on the fact that he fired her. However, because he made the initial decision to hire her, and only fired her approximately fifteen months later, “a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.” *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997) (Brickley, J.), quoting *Proud v Stone*, 945 F2d 796, 797 (CA 4, 1991). The only evidence offered to rebut that inference was plaintiff’s testimony that, beginning in early 1996, Graham “just seemed distant” and didn’t converse with her as much as he had done in the past. Yet, plaintiff admittedly did not know the reason for the change and there is nothing from which one could infer that it was because of her race.

Plaintiff’s claim against Tolerico was also based on the fact that he fired her. As proof that his decision was racially motivated, she offered evidence that he seemed to speak to white employees more often than he spoke to her and he sometimes ignored her when she spoke to him. However, because Tolerico’s behavior could have resulted from preoccupation or some other reasons, and because plaintiff did not know if Tolerico was rude to her alone, it cannot be inferred that his conduct was related to plaintiff’s race. Plaintiff also offered evidence that Tolerico declined to authorize tuition reimbursement for the winter 1996 semester after informing her that she was fired. However, plaintiff did not show that she was in fact qualified to receive reimbursement for the semester and it appears that the decision resulted from, rather than caused, the termination of plaintiff’s employment. Therefore, plaintiff failed to prove a prima facie case of direct intentional discrimination.

If there is no direct evidence of discrimination, a plaintiff can create a rebuttable presumption of intentional discrimination by showing that she was a member of a protected class, that she was qualified for her position, that she was terminated, and that she was replaced by a person outside the protected class. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986); *Harrison v Olde Financial Corp*, 225 Mich App 601, 606-610; 572 NW2d 679 (1997). If a plaintiff presents

sufficient evidence to create a rebuttable presumption of discrimination, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the plaintiff's discharge. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173-174; 579 NW2d 906 (1998) (Weaver, J.). If the defendant makes such a showing, the burden of proof shifts back to the plaintiff to show "that there was a triable issue that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination." *Id.* at 174; *Hall v McRea Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999). "[D]isproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that the discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle, supra* at 175.

In the present case, the evidence showed that plaintiff was black and was terminated from her employment. Assuming that a question of fact existed regarding plaintiff's qualification for her position, it was undisputed that she was never replaced by someone outside the protected class. Therefore, plaintiff failed to make out a prima facie case of indirect intentional discrimination and the question whether defendant had a legitimate nondiscriminatory reason for her discharge or whether that reason was a pretext for discrimination need not be reached.

Discrimination by disparate treatment requires proof that the plaintiff was a member of a protected class and that she was treated differently than persons of a different class for the same or similar conduct. *Plieth v St Raymond Church*, 210 Mich App 568, 572; 534 NW2d 164 (1995). To be similarly situated, "all of the relevant aspects" of the plaintiff's employment situation must be "nearly identical" to those of the employee(s) with whom she compares herself. *Town, supra* at 699-700, quoting *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994). That means that "the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v Toledo Hospital*, 964 F2d 577, 583 (CA 6, 1992).

Plaintiff was terminated for her poor work performance, including problems with the quality of her work and her failure to handle the phone and switchboard properly. There were also problems with the quantity of her work, which apparently was the result of her doing homework during business hours, taking long breaks every day, and taking extended lunch hours. While plaintiff identified several employees who engaged in one or two activities that detracted from their productivity, she did not identify anyone who engaged in such activities and whose work was substandard in some way similar to that of her own. Therefore, plaintiff failed to establish a prima facie case of disparate treatment.

To the extent plaintiff claims that she was subject to a racially hostile and intimidating work environment, the issue is not properly before us because plaintiff fails to address the merits of this issue in her argument. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *In re Webb H Coe Marital & Residuary Trusts*, 233 Mich App 525, 536-537; 593 NW2d 190 (1999).

We also find no error in the trial court's decision to grant summary disposition under MCR 2.116(C)(10) where plaintiff failed to complete her discovery. Initially, we note that the discovery period had closed almost five months before the trial court heard defendants' motion for summary

disposition. Nevertheless, the parties were still attempting to complete the discovery after the close of the discovery period because defendants attempted to accommodate plaintiff. It is apparent from the record, however, that it was plaintiff who failed to timely and reasonably pursue discovery both by seasonably scheduling depositions and obtaining rulings from the trial court on motions to compel answers to interrogatories. Consequently, whether plaintiff was in fact entitled to the discovery she sought or whether defendants properly objected to her discovery requests are not issues properly before us because plaintiff never obtained rulings by the trial court. *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 308; 600 NW2d 664 (1999); *Preston v Dep't of Treasury*, 190 Mich App 491, 498; 476 NW2d 455 (1991).

Even more significantly, plaintiff failed to show that discovery was in fact likely to produce evidence to establish a prima facie case of racial discrimination, and she failed to support with any independent evidence her claim that one or more genuine issues of fact remained. *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983). Plaintiff has not pointed to any deposition testimony, affidavits, or other documents showing that defendants utilized discriminatory employment practices or were otherwise predisposed to discriminate against blacks in order to substantiate her claim of intentional discrimination. Indeed, plaintiff essentially admits that she has no idea if discovery will in fact provide evidence in support of her claims; she states only that it might. Under these circumstances, the trial court did not err in granting defendants' motion. *Pauley, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Roman S. Gibbs
/s/ Mark J. Cavanagh